IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2022-043793

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

13.03.2025
DATE

SIGNATURE

SIBANYE GOLD LIMITED First Appellant

GOLD FIELDS OPERATIONS LIMITED Second Appellant

GFI JOINT VENTURE HOLDINGS (PTY) LTD Third Appellant

and

THE VALUATION APPEAL BOARD FOR
RAND WEST CITY LOCAL MUNICIPALITY First Respondent

THE MUNICIPAL VALUER FOR
RAND WEST CITY LOCAL MUNICIPALITY Second Respondent

RAND WEST CITY LOCAL MUNICIPALITY Third Respondent

JUDGMENT

Mahosi J (Twala J and Allen AJ concurring)

[1] This is an appeal brought in terms of section 18(4) of the Superior Courts Act[1] ("the Act") against the order of Makume J, sitting as a court of first instance, in terms of which it granted the third respondent's section 18(3) application and ordered that the 09 September 2024 order be immediately operational and executable.

[2] It is concerned with whether the parties ought to proceed with the incomplete appeal proceedings before the Valuation Appeal Board for Rand West City Local Municipality ("VAB") to finality before bringing an application to review a ruling granted on separated issues.

[3] The first to third appellants ("the appellants") and the Rand West City Local Municipality ("the Municipality") have been embroiled in litigation relating to the valuation of the mining properties and, consequently, the municipal property rates and taxes since 2013.

[4] The amendment of the Local Government: Municipal Property Rates Act[2] ("the Rates Act"), which came into effect on 01 July 2015, backdrops the issues that gave rise to the current dispute between the parties. Prior to its amendment, section 17(1)(f) exempted mining rights holders from paying municipal property rates and taxes on mining rights. The amendment now allows for rating certain buildings, other immovable structures and infrastructure above the surface of the appellants' mining properties.

[5] The dispute commenced with the publication of the General Valuation Roll on 01 October 2013, which the appellants challenged. An agreement was reached in 2018 for the appellants to pay, in the interim, R108 million per annum pending the preparation of a supplementary valuation roll. In September 2019, the supplementary Valuation Roll 4 ("SVR4"), which pertained to the period 01 July 2014 to 30 June 2019, and later extended to 30 June 2021 ("2014GVR"), was published with an implementation date of 01 October

[1] Act 10 of 2013, as amended.
[2] Act 6 of 2004, as amended.

2019. It reflected the appellants' mining rights at a combined market value of approximately R3,158 billion. In October 2019, the appellants lodged objections against the entries and values of the rateable parts of their respective mining rights in SVR4. The second respondent ("the Municipal Valuer") dismissed the appellants' objections.

[6] Dissatisfied with the outcome, the appellants lodged appeals with the VAB against the Municipal Valuer's decisions on 06 April 2021. At the commencement of the appeal proceedings in May 2022, the parties reached an agreement to have the issues involving the interpretation and application of sections 17(1)(f) and 46(3) of the Rates Act (separated issues) decided first and separately from the other issues in the appeal proceedings. On 04 June 2022, the VAB ordered as follows:

> "1. That the following issues in the appeal proceedings before the Valuation Appeal Board (VAB) be determined separately:
>
> 1.1 Whether the items listed in annexure A to this order are rateable in terms of section 17(1)(f) of the local government municipal property Rates Act 6 of 2004 (Rates Act) with reference to –
>
> 1.1.1 whether they are movable or immovable
>
> 1.1.2 whether they are above the surface of land;
>
> 1.1.3 whether they are required for purposes of mining.
>
> 1.2 In relation to those items that the VAB finds to be rateable, whether they fall to be disregarded because they are-
>
> 1.2.1 under the surface of the property as contemplated in section 46(3)(a) of the Rates Act; or
>
> 1.2.2 equipment as contemplated in section 46(3)(b) of the Rates Act; or
>
> 1.2.3 machinery as contemplated in section 46(3)(b) of the Rates Act."

[7] The appeal hearing on the separated issues was held around May and June 2022, during which the appellants and the Municipality presented expert evidence and legal argument to the VAB. On 19 July 2022, the VAB ruled as follows:

> "1. The Industrial headgear and winders are regarded as infrastructure above the surface and are required for mining purposes, these items are rateable in terms of section 17(1)(f) of the Local Government: Municipal Property Rates Act 6 of 2004 ("MPRA"). These items cannot be disregarded in terms of section 46(3)(b) of the MPRA.

2. The bulk air coolers, industrial cooling and refrigeration plants are regarded as infrastructure, above the surface and are required for mining purposes, these items are rateable in terms of section 17(1)(f) of the MPRA. These items cannot be disregarded in terms of section 46(3)(b) of the MPRA.
3. The steel and High Density Polyethylene (HDPE") pipes are regarded as infrastructure above the surface and are rateable in terms of section" These items cannot be disregarded in terms of section 46(3)(b) of the MPRA.
4. With regard to the industrial, residential and social electricity, these constitute infrastructure and only those owned by the Appellants, are above the surface and are required for mining purposes are rateable in terms of section 17(1)(f). These items cannot be disregarded in terms of section 46(3)(b) of the MPRA.
5. With regard to the Industrial and social sewer and wastewater treatment the following applies:
    5.1 The underground sewer and waste handling pipes are rateable in terms of section 17(1)(f) of the MPRA although they are regarded as infrastructure and cannot be disregarded in terms of section 46(3)(b) of the MPRA.
    5.2 The dams, concrete tanks and concrete tranches at the wastewater treatment facilities excluding, the agitators, pumps, motors, electrical cables and pipes are rateable in terms of section 17(1)(f) of the MPRA.
6. Industrial water supply, distribution pipes, potable water supply and distribution pipes belonging to the Appellants are rateable in terms of section 17(1)(f) of the MPRA. These items cannot be disregarded in terms of section 46(3)(b) of the MPRA.
7. The concrete surface water reservoirs, owned by the Appellants are rateable in terms of section 17(1)(f) of the MPRA in that they are immovable structures above the surface of the mining property required for purposes of mining. These items cannot be disregarded in terms of section 46(3)(b) of the MPRA.
8. It is common cause between the parties that the railways and railway stations are no longer applicable and therefore cannot be taken into account.
9. Roads (gravel and tar) are ruled out as they are no longer disputed."

[8] Aggrieved by the VAB's decision, the appellants launched an application to review and set it aside on 04 November 2022. In its answering affidavit, the Municipality relied on

section 7(2) and (c) of Promotion of Administrative Justice Act[3] ("PAJA") to raise a preliminary point challenging the appellants' failure to exhaust internal remedies prior to filing a review application. The review application served before Makume J on 26 August 2024 and the judgment was handed down on 09 September 2024. In his judgment, Makume J dismissed the review application and upheld the preliminary point ordering the appeal proceedings before the VAB to proceed to its finality.

[9] On 30 September 2024, the appellants applied for leave to appeal Makume J's judgment and order. In opposing the appellants' leave to appeal application, the Municipality brought the section 18(3) application, seeking the interim enforcement of the judgment and orders. Both applications were argued before Makume J on 22 January 2025. On 23 January 2025, Makume J issued an order dismissing the appellants' leave to appeal application and upholding the Municipality's section 18(3) application. It was against the above execution order that the appellants exercised their automatic right of appeal under section 18(4) of the Act.

[10] At the outset of the oral arguments before us and in the heads of arguments, the appellant's counsel relied on the alleged misdirection by the Court of first instance, which they submitted was dispositive of this appeal. In particular, they stated as follows:

> "...the granting of the section 18(3) order was a misdirection by the court a quo. To that end, we show that the Court a quo erred in upholding the Municipality's application in terms of section 18(3) of the Act (section 18(3) application) in circumstances where it had decided to dismiss the appellants' application for leave to appeal. We submit that a quo ought to have instead found that the section 18(3) order would have no practical effect in these circumstances."

[11] A similar issue was considered in Ntlemeza v Hellen Suzman Foundation and another[4] where the counsel for Ntlemeza argued, inter alia, that the Court was precluded from considering an application to enforce an order where the jurisdictional fact of a pending decision on an application for leave to appeal or an appeal was absent. The SCA commenced with the consideration of the provisions of section 18(1) and (2) and said:

> "[25] ...These two sections provide for two situations. First, a judgment (the principal order) that is final in effect, as contemplated in s 18(1): In such a

[3] Act 3 of 2000
[4] [2017] ZASCA 93 (9 June 2017)

case the default position is that the operation and execution of the principal order is suspended pending 'the decision of the application for leave to appeal or appeal'. Second, in terms of s 18(2), an interlocutory order that does not have the effect of a final judgment: The default position (a diametrically opposite one to that contemplated in s 18(1)) is that the principal order is not suspended pending the decision of the application for leave to appeal or appeal. This might at first blush appear to be a somewhat peculiar provision as such a decision is not appealable. However, this subsection appears to have been inserted to deal with the line of cases in which the ordinary rule was relaxed referred to in para 20 above.

[26] Both sections empower a court, assuming the presence of certain jurisdictional facts, to depart from the default position. It is uncontested that the high Court's judgment on merits of General Ntlemeza's appointment is one final in effect and therefore s 18(1) applies. This section provides that the operation and execution of a decision that is the 'subject of an application for leave to appeal or appeal' is suspended pending the decision of either of those two processes. Section 18(5) defines what the words "subject of an application for leave to appeal or of appeal' mean: 'a decision becomes the subject of an application for leave to appeal or appeal, as soon as an application for leave to appeal or notice of appeal is lodged with the registrar in terms of the rules."

[12] In determining whether the dismissal of the application for leave to appeal before a decision on execution application removed the jurisdictional underpinning for an execution order, the SCA's short answer was "no". Its reasons were, inter alia, that:

"[28] The primary purpose of s 18(1) is to reiterate the common law position in relation to the ordinary effect of appeal processes – the suspension of the order being appealed – not to nullify it. It was designed to protect the rights of litigants who find themselves in the position of General Ntlemeza, by ensuring, that in the ordinary course, the orders granted against them are suspended whilst they are in the process of attempting, by way of the appeal process, to have them overturned. The suspension contemplated in s 18(1) would thus continue to operate in the event of a further application for leave to appeal to this Court and in the event of that being successful, in relation to the outcome of a decision by this Court in respect of the principal order.

Section 18(1) also sets the basis for when the power to depart from the default position comes into play, namely, exceptional circumstances which must be read in conjunction with the further requirements set by s18(3). As already stated and as will become clear later, the Legislature has set the bar fairly high."

[13] The SCA found that General Ntlemeza's preliminary point did not accord with the plain meaning of s 18(1). It explained that "s 18(1) does not say that the Court's power to reverse the automatic suspension of a decision is dependent on that decision being subject to an application for leave to appeal or an appeal. It says that, unless the court orders otherwise, such a decision is automatically suspended."

[14] This approach was confirmed by the Constitutional Court in Department of Transport and Others v Tasima (Pty) Limited; Tasima (Pty) Limited and Others v Road Traffic Management Corporation and Others[5] as follows:

"[51] Subsection (1), which is subject to subsections (2) and (3), provides that the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal is suspended pending the decision of the application for leave to appeal or the appeal, unless a court under exceptional circumstances orders otherwise. In turn, subsection (2) is made subject to subsection (3). It provides that, unless a court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the final effect of a final judgment, which is the subject of an application for leave to appeal or an appeal, is not suspended pending the decision on the application for leave to appeal or an appeal.

[52] Crucially, subsection (3) requires an applicant for an execution order to prove "on a balance of probabilities that he or she will suffer irreparable harm if the order is not granted and that the other party will not suffer irreparable harm if the court so orders". As explained in Ntlemeza, section 18(1) reiterates the common law position to the effect that the operation or execution of a judgment is suspended when there is an application for leave to appeal or an appeal. What ultimately happens to the suspended operation

[5] 2018 (9) BCLR 1067 (CC)

or execution of a judgment subject to an appeal process would be determined by the outcome of the appeal. If the appeal is unsuccessful the suspension would cease, unless, of course, as noted in Ntlemeza, "a further application for leave to appeal" is made.

[53] If a court grants an order for the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, and its judgment is subsequently set aside on appeal and judgment is granted in favour of the appellant as it happened in Tasima I, the order made under section 18(3) would then fall away. This is so once no further application for leave to appeal is made or all appeal avenues have been exhausted. This, in my view, accords with the intention and the tenor of section 18."

[15] In the current matter, the order of Makume J came immediately into operation and was executable when it was issued on 09 September 2024. When the appellants filed their application for leave to appeal, the order was suspended pending the decision on that application. Thus, the Municipality's application for the execution order was within the framework of section 18(1), and the Court a quo did not err in adjudicating it.

[16] The remaining issue is whether the Court a quo considered the requirements of section 18, which reads:

"(1) Subject to subsections (2) and (3), and unless the Court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) Subject to subsection (3), unless the Court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the Court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the Court does not so order and that the other party will not suffer irreparable harm if the Court so orders.

(4) If a court orders otherwise, as contemplated in subsection (1) -

(i) the Court must immediately record its reasons for doing so;

(ii) the aggrieved party has an automatic right of appeal to the next highest Court;

(iii) the Court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal.

(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.

[17] In Incubeta Holdings (Pty) Ltd and Another v Ellis and Another[6] ("Incubeta"), the Court considered the provisions of section 18 and formulated the test as follows:

"[16] It seems to me that there is indeed a new dimension introduced to the test by the provisions of s 18. The test is twofold. The requirements are:

- First, whether or not 'exceptional circumstances' exist; and
- Second, proof on a balance of probabilities by the applicant of -
  - the presence of irreparable harm to the applicant/victor, who wants to put into operation and execute the order; and
  - the absence of irreparable harm to the respondent/loser, who seeks leave to appeal."[7]

[18] The issue is whether the Municipality established exceptional circumstances and proven, on a balance of probabilities, that the appellants would suffer no irreparable harm if the section 18(3) order were granted and that the Municipality would suffer irreparable harm if the section 18(3) order were denied.

[19] On what constitutes exceptional circumstances, the SCA in Ntlemeza referred to Incubeta in which guidance was sought from MV Ais Mamas Seatrans Maritime v Owners,

[6] 2014 (3) SA 189(GJ)
[7] At para 16 supra

MV Ais Mamas and another[8] where the Court stated that it was neither desirable nor possible to lay down precise rules as to what circumstances are to be regarded as exceptional circumstances and that each case must be decided on its own fact. In Incubeta, the Court stated that:

> "[17] What constitutes "exceptional circumstances has been addressed by Thring J in MV Ais Mamas 2002 (6) SA 150 (C), where a summation of the meaning of the phrase is given as follows at 156I – 157C:
>
> What does emerge from an examination of the authorities, however, seems to me to be the following:
>
> 1. What is ordinarily contemplated by the words "exceptional circumstances" is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different; "besonder", "seldsaam", "uitsonderlik", or "in hoë mate ongewoon".
>
> 2. To be exceptional, the circumstances concerned must arise out of, or be incidental to, the particular case.
>
> 3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.
>
> 4. Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.
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> 5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.

[8] 2002 (6) SA 150 (C)

[18] Significantly, although it is accepted in that judgment that what is cognisable as 'exceptional circumstances' may be indefinable and difficult to articulate, the conclusion that such circumstances exist in a given case, is not a product of a discretion, but a finding of fact."

[20] The Court a quo referred to, amongst others, Incubeta and considered the history and the chronology of the events, which it regarded as not only constituting exceptional circumstances but also demonstrating irreparable harm to the Municipality. It took into account the provisions of the Rates Act, which envisages the finalisation of the appeal process within 141 days, the Municipality's constitutional obligations to "structure and manage its administration and budgeting planning process to give priority to the basic needs of the community and to promote the social and economic development of the community", and regarded the four-year delay as detrimental to the Municipality as it is prohibited from implementing the supplementary valuation roll pending the final determination of the appeal proceedings. It also considered the appellants' retraction from the agreement between the parties to the VAB proceedings soon after the ruling on the separated issues and the agreed dates for the continuation of the appeal to be disturbing.

[21] Before us, the appellants submitted that there was nothing exceptional, uncommon, rare or different about the duration of the appeal proceedings such as to justify an extraordinary deviation from the norm. We disagree with the appellants. The Municipality's proper management of administration and budgeting is crucial in meeting its constitutional duty to provide essential services to the communities. Thus, the protracted procedural delay in the finalisation of an appeal process, which is envisaged by the Rates Act to be finalised within 141 (even if not protracted in bad faith by a litigant), the critical role of the Municipality in the community and the public interest ought to be sufficient to cross the threshold of 'exceptional circumstances'.

[22] Regarding the requirements of section 18(3), the Court a quo took into account the Municipality's submission that it suffers irreparable harm every month as the delay in the finalisation of the appeal process and, thus, the implementation of the Valuation roll has caused havoc in the Municipal administration and finances. The appellants classified the Municipality's alleged irreparable harm as purely speculative on the basis that it was founded on the presumption that VAB would rubber-stamp the value of R3.7 billion. In addition, they contended that the rates based on the impugned values reflected in the

SVR4 and against which the appellants have objected and appealed could not be included in the funded budget as realistically anticipated revenues to be collected in that year or any other year pending the finalisation of the appeal proceedings. However, the appellants overlook that the delay in finalising the appeal process, notwithstanding its outcome, contributes to the Municipality's ability to put its finances in order and comply with its constitutional mandate. Its irreparable harm is, therefore, not speculative.

[23] The appellants submitted that if Makume J's order is executed, they stand to suffer irreparable harm as they would be compelled to pay the alleged property rates based on values that were determined on defective VAB's decision, which, if later reviewed and set aside, would amount to substantial overpayment. Further, they alleged irreparable harm in the form of significant wasted costs estimated at R15,5 million, which they are unlikely to recover if they are successful, considering the Municipality's financial position.

[24] The appellants' fear of substantial overpayment is inaccurate, as they retain the right to review the final decision of the VAB as soon as it is issued. It is common cause that the appellants filed a further application for leave to appeal in the SCA. This and further appeal processes up to the Constitutional Court were reasonably anticipated by the Court a quo, which viewed the appellant to be litigating lavishly at the expense of the public. For all the above reasons, the Court a quo cannot be faulted in finding that the appellants stand to suffer no irreparable harm if the execution order is granted. In light of the above, the appeal is bound to fail.

[25] Accordingly, the following order is made:

Order

1. The appeal is dismissed with costs.

2. The order of the Court a quo granting the third respondent's section 18(3) application is upheld, with costs, and the order of 09 September 2024 is immediately operational and executable.

D. MAHOSI

ACTING JUDGE OF THE HIGH COURT

Heard: 26 February 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives through email. The date for hand-down is deemed to be 13 March 2025.

Appearances

For the appellants:	Advocate C.F. van der Merwe
Instructed by:	Norton Rose Fulbright South Africa Inc. Attorneys
For the third respondent:	Mr A.D. de Swart of De Swart Myambo Hlahla Attorneys